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No. 08-235

FILED
SEP 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

SHAFIQ RASUL, ET AL.,
Petitioners,
v.
RICHARD MYERS, AIR FORCE GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AND MILITARY LAW AND HISTORY SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONERS*

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INTEREST OF AMICI[1]

Amici are retired military officers, scholars of military law and history, and a nonprofit organization dedicated to advancing the fair administration of military justice. They have an interest in the maintenance of our Nation's military tradition of humane treatment of detainees captured in armed conflict and strict enforcement of military, domestic and international law requiring such treatment.

Commander (Ret.) David Glazier served twenty-one years as a United States Navy surface warfare officer and is now an Associate Professor of Law at Loyola Law School Los Angeles, where he teaches the law of war.

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[1] Pursuant to Supreme Court Rule 37.2(a), amici curiae certify that counsel of record of all parties received timely notice of the intent to file this brief in accordance with this Rule and they have consented to the filing of this brief. Letters of consent by counsel of record for the parties have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, amici also certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to its preparation or submission.

Jonathan Lurie, Professor of History and Adjunct Professor of Law at Rutgers University, teaches legal history and military legal history.

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The National Institute of Military Justice ("NIMJ") is a nonprofit corporation organized to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty, but nearly all of whom have served as military lawyers, several as flag and general officers.

SUMMARY OF ARGUMENT

Amici submit this brief in support of the petition for certiorari, insofar as it asks this Court to review the D.C. Circuit's decision affirming that United States civilian and military officials alleged to have ordered, authorized or condoned torture or inhumane treatment of detainees interrogated by their subordinates are entitled to immunity under the Westfall Act, because these officials were acting within the "scope of [their] employment" and to qualified immunity because it was not established at the time that the victims of these practices, detainees at Guantanamo, had recourse to a suit under the Constitution.

Review by this Court is appropriate because these aspects of the D.C. Circuit's decision threaten

to undermine long-standing principles of military law and tradition absolutely forbidding torture and inhumane treatment of detainees and the doctrine of command responsibility. Under that doctrine, military officials and their civilian superiors are under a duty to train their subordinates to refrain from torture or inhumane treatment and prevent it if within their power to do so and are held legally accountable if they fail to do so. Review by this Court is needed to clarify that officials who, instead, authorize or condone such conduct are not acting within their "scope of employment" and hence are not entitled to Westfall Act immunity.

Similarly, review by this Court is needed to clarify that qualified immunity is unavailable to officials who authorize or condone torture and inhumane treatment in blatant violation of their duties to their troops and military and civilian law even if, at the time, it had not yet been established that the victims of those unlawful practices had a right to sue under the Constitution. The doctrine of qualified immunity should not be available to shelter conduct so plainly unlawful and that military law and policy emphatically reject.

ARGUMENT

I. REVIEW BY THIS COURT IS NEEDED TO ESTABLISH THAT IMMUNITY IS UNAVAILABLE TO OFFICIALS WHO VIOLATE THEIR DUTIES AS MILITARY COMMANDERS BY AUTHORIZING OR CONDONING TORTURE AND INHUMANE TREATMENT

A significant feature of this case, making it especially appropriate for review, is its potential impact on our military forces and their standing in the world. The absolute prohibition of torture and inhumane treatment, in particular under military law and tradition, and the responsibility of those in command to prevent it are essential to the discipline of our military, their reputation, their protection from criminal liability, and their safety should they fall into enemy hands.

Furthermore, while Amici focus on the impact such derelictions of duty have on our military, the impact on victims of such abuses should not be overlooked. A significant purpose of the doctrine of command responsibility is to incentivize those in command to protect persons in custody from mistreatment by holding them accountable if they fail to do everything in their power to prevent such mistreatment by their subordinates. Where those in command instead authorize or condone such mistreatment, immunizing them from monetary liability to the victims diminishes that incentive and undermines a central tenet of military law and policy.

Review by this Court is needed to determine whether immunity is warranted in view of the damage officials who authorize or condone such abuses by their subordinates inflict on victims, our military, and our Nation.

A. Torture and Inhumane Treatment Have Long Been Forbidden by Military Law and Policy and the Law of War

1. Humane Treatment of Detainees Has Been a Cornerstone of United States Military Doctrine Since the Nation's Founding.

Since the Revolutionary War, the United States military has maintained a tradition of treating captured combatants humanely. This tradition began with George Washington, who, after the Battle of Trenton, ordered his troops to treat hundreds of surrendering Hessian soldiers "with humanity," and to "[l]et them have no reason to complain of our copying the brutal example of the British army." David Hackett Fischer, *Washington's Crossing*, 377-79 (2004).

This tradition was codified during the Civil War, when President Lincoln signed General Orders No. 100, also known as the Lieber Code. Francis Lieber, *Instructions for the Gov't of Armies of the United States in the Field*, U.S. War Dep't Gen. Orders No. 100 (April 24, 1863). The Lieber Code forbade the "intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity" upon a prisoner of war, *id.* at § III, art. 56, and specified that

while prisoners of war may be confined "such as may be deemed necessary on account of safety," they "are to be subjected to no other intentional suffering or indignity" and "treated with humanity." *Id.* at art. 75-76. The Code expressly forbade using violence to interrogate enemy captives. *Id.* at § I, art.16 ("Military necessity does not admit of cruelty . . . nor of torture to extort confessions.").

The Lieber Code has greatly influenced United States. military tradition and the law of war. During the 19th century, the Code served as the foundation for instruction on the law of war at the United States Military Academy. *See* Col. Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 Mil. L. Rev. 112, 114 (2004).

It also formed "the basis of every convention and revision" of international law concerning the treatment of prisoners of war, including the Hague Conventions of 1899 and 1907, the first multilateral codification of the modern law of war. Brig. Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 Miami L.Q. 40, 42 (1950). The brutality of the First World War prompted the United States and more than forty other countries to enter into the 1929 Geneva Convention Relative to the Treatment of Prisoners of War. After the Second World War, the laws of war were revisited, resulting in the adoption in 1949 of the four Geneva Conventions.[2]

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[2] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the

The United States military has long trained its officers to observe the laws of war and the standards of the Hague and Geneva conventions. *See generally* Finnegan, 181 Mil. L. Rev. 112; U.S. Dep't of the Army, Field Manual 27-10, *The Laws of Land Warfare* (July 1956) ("FM 27-10"). The four Geneva Conventions of 1949 provide comprehensive standards for the treatment of persons detained in armed conflicts. The Geneva Convention Relative to the Treatment of Prisoners of War ("GPW" or "Third Convention") addresses the treatment of prisoners of war. Common Article 3 – so denominated because it is common to all four Geneva Conventions – addresses the treatment of persons detained in armed conflicts that do not involve conflicts between nations, such as civil wars. Common Article 3 prohibits "violence to life and person . . . mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment" against *all* detainees. *See, e.g.*, GPW, Art. 3.

Article 75 of Protocol I to the Geneva Conventions prohibits torture, "violence to the life, health, or physical or mental well-being," and

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Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (collectively, the "1949 Geneva Conventions"). All four conventions were ratified by the United States in 1955. *See* 101 Cong. Rec. 9,958-73 (1955).

"outrages upon personal dignity, in particular humiliating and degrading treatment" of any detainees. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Prot. of Victims of Int'l Armed Conflicts, Art. 75 at ¶ 2, June 8, 1977, 1125 U.N. 3, ("Protocol I"). The United States has not adopted Protocol I, but "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319, 322 (2003).[3]

The United States military has maintained its commitment to provide humane treatment to detainees, even if detainees do not qualify for treatment as "prisoners of war" under the Third Convention. During the Vietnam War, the United States extended the Convention's prisoner of war protections to all captives – including Viet-Cong, who did not follow the laws of war. *See* United States Military Assistance Command for Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in* Charles I. Bevans, ed., *Contemporary Practice of the United States Relating to Int'l Law*, 62 Am. J. Int'l L. 754, 766-67 (1968).[1]

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[3] Mr. Taft was Legal Adviser to the Department of State from 2001 to 2005.

[1] During the Korean War, the United States adhered to the Third Convention even though it had not yet ratified it. *See* Maj. James F. Gebhardt, *The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience*, Military Review, Jan.-Feb. 2005, at 2, 15.

During the 1970s the United States Army adopted the "implementation of the Geneva Conventions" as the main objective of enemy prisoner of war operations in place of the "acquisition of maximum intelligence information." *See* Gebhardt, *The Road to Abu Ghraib*, at 44, 50.

2. The Uniform Code of Military Justice and the Military's own Regulations Forbid the Mistreatment of Detainees

The conduct of military personnel is governed by the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 101, *et seq.*, and Field Manuals issued by the Armed Forces. The UCMJ and the Field Manuals have consistently prohibited the mistreatment of detainees.

The UCMJ prohibits a member of the military from committing acts of "cruelty toward, or oppression or maltreatment of any person subject to his orders." 10 U.S.C. § 893. Actual and attempted murder, manslaughter, rape, maiming and assault are punishable under the UCMJ. 10 U.S.C. §§ 880, 918-920, 924, 928. Extorting or threatening a detainee for information is also prohibited., 10 U.S.C. §§ 927, 934.

FM 27-10 contains the Army's interpretation of the law of war, which incorporates international conventions – including the 1949 Geneva Conventions – and the customary law of war. Importantly, FM 27-10 incorporates Common Article 3. *See* FM 27-10, Art. 11; *see also id.* at Arts. 246, 248, 271, 446.

Army Field Manual 34-52, *Intelligence Interrogation* (May 1987) ("FM 34-52")[5], which set forth the United States Army's official position on acceptable interrogation techniques and prohibited conduct at the time of the acts alleged by Petitioners, provides that interrogators must operate "within the constraints" established by the UCMJ and the Geneva Conventions. FM 34-52, *preface* at iv. FM 34-52 emphasizes that the Geneva Conventions and United States policy "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." *Id.* at 1-8; *see also id.* at 1-12 (threats constitute coercion).[6]

FM 34-52 also emphasizes the doctrine of command responsibility: commanders must act to insure that their subordinates abide by the Geneva Conventions and are personally accountable for their subordinates' violations. FM 34-52 specifies that the Geneva Conventions impose an "affirmative duty upon commanders to insure their subordinates are

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[5] On September 6, 2006, FM 34-52 was replaced with Field Manual 2-22.3, *Human Intelligence Collector Operations* (Sept. 2006) ("FM 2-22.3"). This manual contains the same prohibitions on torture and mistreatment of detainees as FM 34-52 and re-emphasizes the military's commitment to the Geneva Conventions and in particular to Common Article 3. *See, e.g.*, FM 2-22.3 at 5-26.

[6] The manual includes as examples of physical and mental torture: infliction of pain through chemicals or bondage; forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; any form of beating; mock executions; and abnormal sleep deprivation. *Id.* at 1-8; *see also id.* at D-1 – 2.

not mistreating protected persons or their property. The command and the government will ultimately be held responsible for any mistreatment." FM 34-52, D-1. These principles apply regardless of whether a detainee is an enemy prisoner of war, a captured insurgent, or a civilian detainee. *Id.* at 1-7. Army personnel know that "improper" or "unlawful" interrogation techniques may harm critical intelligence gathering efforts and "send U.S. soldiers to prison." *Id.* at C-4.

Against this background, the Offices of the Judge Advocate General for the Navy, Army and Air Force in 2003 expressed concern over the suggested authorization of aggressive interrogation techniques in a draft report for Secretary Rumsfeld. Brigadier General Kevin M. Sandkuhler, United States Marine Corps, Staff Judge Advocate to the Commandant of the Marine Corps, warned that authorizing aggressive interrogation techniques would have a number of adverse affects, including "Criminal *and Civil Liability* of DOD Military and Civilian Personnel in Domestic, Foreign, and International Forums." Memorandum from Brig. Gen. Kevin M. Sandkuhler, U.S. Marine Corps, Staff Judge Advocate to the Commandant of the Marine Corps, to Gen. Counsel of the Air Force (Feb. 27, 2003) *reprinted in* 151 Cong. Rec. S8794 (emphasis added). Similarly, Major General Jack L. Rives, Deputy Judge Advocate General of the United States Air Force, suggested that the report contain the following:

> U.S. Armed Forces are continuously trained to take the legal and moral 'high-road' in the conduct of our military

> operations regardless of how others may operate. While the detainees' status as unlawful belligerents may not entitle them to protections of the Geneva Conventions, that is a legal distinction that may be lost on the members of the armed forces. *Approving exceptional interrogation techniques may be seen as giving official approval and legal sanction to the application of interrogation techniques that U.S. Armed Forces have heretofore been trained are unlawful.*

Memorandum from Major Gen. Jack L. Rives, Deputy Judge Advocate Gen. of the U.S. Air Force, to SAF/GC (Feb. 6, 2003) *reprinted in* 151 Cong. Rec. S8794-95 (emphasis added).

Likewise, Major General Thomas J. Romig, United States Army, Judge Advocate General, noted that some of the "aggressive counter-resistance interrogation techniques" being considered by the Department of Defense failed to "comport with Army doctrine as set forth in Field Manual (FM) 34-52 Intelligence Interrogation."[7]

In July 2004, Alberto Mora, then General Counsel to the Navy, criticized the interrogation

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[7] Memorandum from Major Gen. Thomas J. Romig, U.S. Army, Judge Advocate Gen., to Gen. Counsel of the Air Force (Mar. 3, 2003), *reprinted in* 151 Cong. Rec. S8794

techniques authorized by Secretary Rumsfeld in his December 2, 2002 memorandum,[8] stating:

> [These techniques] should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture . . . . Furthermore, even if the techniques as applied did not reach the level of torture, they almost certainly would constitute 'cruel, inhuman, or degrading treatment, another class of unlawful treatment.

See Memorandum from Alberto J. Mora to Inspector Gen., U.S. Dep't of the Navy at 6 (July 7, 2004).[9]

* * *

In addition to the military law and policy discussed above, Petitioners describe civilian law prohibitions on torture and cruel, inhuman and degrading treatment under the U.N. Convention Against Torture and the prohibition of torture under customary international law and United States

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[8] Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Def., to Donald Rumsfeld, Sec'y of Def. (Nov. 27, 2002) (approved by Sec'y Rumsfeld on Dec. 2 2002), available at http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf, last visited Sept. 21, 2008.

[9] The memorandum is available at http://www.newyorker.com/images/pdfs/moramemo.pdf, last visited Sept. 21, 2008. *See also* Jane Mayer, The Dark Side at 213-37 (2008).

criminal law. (Pet. at 27-30.) Amici, however, emphasize the centrality of the 200-year tradition of military law and policy to prohibit torture and inhumane treatment, the duty of those in command to do all in their power to prevent such practices by their subordinates, and the principle that they will be held legally accountable if they fail to do so. For as we show in the next section, the D.C. Circuit's decision affirming immunity for officials claimed to have authorized or condoned such practices is totally at odds with those military doctrines.

B. Law, Military Policy and the Welfare of Our Armed Forces Require That Officials Authorizing or Condoning Torture or Inhumane Treatment Be Held Accountable, Not Immune

The D.C. Circuit's holding that Respondents are entitled to Westfall Act and qualified immunity conflicts with the principle that those in command of our armed forces have a duty to train their subordinates to refrain from torture and inhumane treatment and must accept responsibility for their failure to prevent such conduct where it is in their power to do so. Here it is alleged that respondents not only violated that duty but authorized or condoned such illegal conduct.

Review by this Court is needed to establish that whatever immunities are appropriate in other contexts, high civilian and military officials should be accountable, not immune, if they authorize or condone torture or inhumane treatment. This principle is essential to the discipline, safety and reputation of our armed forces.

1. Officials Who Authorize or Condone Torture or Inhumane Treatment Violate Their Duties as Military Commanders and Therefore Are Not Acting Within Their "Scope of Employment" As Required for Westfall Act Immunity

Under United States military law and the law of war, those in command are legally responsible for the unlawful conduct of their subordinates, if they direct it, fail to take measures within their power to prevent it, or fail to investigate and punish violations which they are or should be aware.[10] This doctrine of command responsibility has been recognized in international law at least since a proclamation of Charles VII of France in 1439,[11] and is embedded in the law of war[12] and United States military regulations.

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[10] *See, e.g., Estate of Ford* v. *Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002); Protocol I, *supra*, art. 86(2).

[11] *See* L.C. Green, *Command Responsibility in Int'l Humanitarian Law*, 5 Transnat'l L. & Contemp. Probs. 319, 320-21 (1995).

[12] *See, e.g.*, Protocol I of the Geneva Conventions of 1949, *supra*, art. 86(2); Rome Statute of the Int'l Criminal Court, art. 28, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3; Statute of the Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 7, May 25, 1993, U.N. Doc. S/25704; Statute of the Int'l Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of Int'l Humanitarian Law Committed in the Territory of

The doctrine was recognized by this Court in *In re Yamashita*, 327 U.S. 1 (1946), which held that General Yamashita, the commander of Japanese forces in the Philippines, was properly charged under the law of war for atrocities committed by troops under his command. *Id.* at 17. Yamashita argued that he could not be tried by military commission because he had not been charged with a violation of the law of war, as required by the statute authorizing the commission. *Id.* at 14. This Court disagreed, finding that the charge that he failed to take measures to prevent atrocities committed by forces under his command satisfied the statute, because "the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war. . . ." *Id.* at 14-15. *See also, e.g.*, *Estate of Ford* v. *Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002); *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 776-78 (9th Cir. 1996); *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 171-73 (D. Mass. 1995).

Most importantly, this doctrine is embraced by United States Army regulations and field manuals. A soldier who exercises command authority in the United States military "[is] responsible for everything [his or her] command does or fails to do." U.S. Dep't of Army, Army Regulation 600-20, *Army Command Policy*, §2-1b (June 2006). A commander

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Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighboring States Between Jan. 1, 1994 and Dec. 31, 1994, art. 6, Nov. 8, 1994, 33 I.L.M. 1598.

assumes "the legal and ethical obligation . . . for the actions, accomplishments, or failures of a unit." U.S. Dep't of Army, Field Manual 101-5, *Staff Org. and Operations*, 1-1 (May 1997) ("FM 101-5"). As a matter of official military policy, the "ultimate authority, responsibility, and accountability" for the acts of subordinates "rest wholly with the commander." *Id.* at 1-2.[13]

Command responsibility is recognized as fundamental to military discipline and effectiveness. It provides incentives for commanders to control their subordinates and for subordinates to follow the orders of commanders who they know are accountable for them. *See* U.S. Dep't of Army, Field Manual 22-100, *Military Leadership*, §§ 3-22 – 3-23 (Aug. 1999) ("FM 22-100")[14]; Cmdr. Roger D. Scott, *Kimmel, Short, McVay: Cases Studies in Executive Authority, Law and the Individual Rights of Military Commanders*, 156 Mil. L. Rev. 52, 169-170 (1998) ("command responsibility is the bedrock upon which all military discipline rests") (quoting Sen. Malcolm Wallop (R-WY)); *Prosecutor* v. *Delali, et al.*, Case No. IT-96-21-T, Judgment, ¶ 647 (Nov. 16, 1998) ("The doctrine of command responsibility is . . . a species of

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[13] Command responsibility does not absolve subordinates from liability for obeying manifestly illegal orders. Subordinates who comply with such orders remain responsible for their actions.

[14] In October 2006, the U.S. Army replaced FM 22-100 with Field Manual 6-22, *Army Leadership* (Oct. 2006) ("FM 6-22"), which reaffirms the same doctrines of command responsibility as FM 22-100. *See* FM 6-22 §§ 2-10 – 2-12, 4-16, 6-22.

vicarious responsibility through which military discipline is regulated and ensured.").

Moreover, for the United States military, command responsibility is more than an effective way to promote discipline; it is an essential moral value:

> The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority. Nowhere else does a boss have to answer for how subordinates live and what they do after work. Our society and the institution look to commanders to make sure the missions succeed, that people receive proper training and care, that values survive.

FM 22-100, §1-61.

It is integral to United States military tradition that before a military commander is considered fit to exercise this sacred trust, he or she must internalize, accept and *embody* certain core values, including loyalty, duty, respect, and integrity. *See id.* at §§1-1 – 1-4, 2-4 – 2-39. Pursuant to these values, a leader "take[s] full responsibility for [his] actions and those of [his] subordinates." *Id.* at §2-14.

The doctrine of command responsibility is completely inconsistent with the D.C. Circuit's holding that the violations of Respondents' duties alleged here came within their "scope of employment", entitling them to Westfall Act immunity.

law and policy are specifically designed to discourage such conduct and there is therefore no reason to shelter it from the threat of litigation that might "chill" such illegal conduct.

This Court has not had any prior opportunity to consider the applicability of qualified immunity to conduct so inimical to our armed forces. We urge the Court to accept review to make it clear that our law discourages such conduct and offers no solicitude for officials who engage in it to the great detriment of our military and our Nation.

CONCLUSION

For the reasons set forth above, Amici respectfully urge the Court to grant the petition for certiorari, insofar as it relates to the issues of immunity.

Dated: September 24, 2008

Respectfully submitted,
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